UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:	**)**	
	)	**Docket No. CWA-08-2005-0033**
Melotz Trucking, Inc.	**)**	**Proceeding under Subsection 309(g)**
A Montana Corporation.	**)**	**of the Clean Water Act,**
	)	**33 U.S.C. § 1319(g)**
Respondent	**)**	
	)	

DEFAULT INITIAL DECISION AND ORDER

I. BACKGROUND

Melotz Trucking, Inc. ("Melotz", or "Respondent") is a Montana corporation doing business in the State of Montana. Respondent owns and operates a trucking company that provides de-icing and dust abatement products and services. The Respondent's business is located at 9780 Summit Drive, Missoula, Montana.

On or about August 3, 2004, a semi-truck pulling a double tanker trailer owned by Respondent, was traveling westbound on Interstate 90 near MP 175.5, Garrison, Montana. A nut on the hitch pin of the second tanker trailer came off causing the second trailer to disengage from the unit and roll onto its top. The tanker trailer leaked its contents, 2000 gallons of Magnesium Chloride (26 to 35 percent solution), into the median which drained into the Little Blackfoot River.

Pursuant to Section 301 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1311, it is unlawful for any person to discharge a pollutant from a point source to waters of the United States except with the authorization of, and in compliance with, an NPDES permit issued pursuant to section 402 of the CWA, 33 U.S.C. § 1342. Section 502(12) of the Act, 33 U.S.C. §1362(12), defines "discharge of a pollutant" as "…any addition of any pollutant to navigable waters from any point source…" Section 502(6) of the Act, 33 U.S.C. §1362(6), defines pollutant to include "…chemical wastes…" The Little Blackfoot River is considered a waters of the United States under Section 502(7) of the Act, 33 U.S.C. §1362(7).

On June 21, 2005, The United States Environmental Protection Agency, Region 8 ("EPA", or "Complainant") filed and mailed to the Respondent a certified letter with the Administrative Penalty Complaint and Notice of Opportunity for Hearing ("Complaint") attached.[1] *See*, 40 C.F.R. § 22.5(a)(1). The Complaint alleges one count of discharging

[1] Complainant states in its Motion for Default that the Complaint was originally sent by certified mail on June 21, 2005. A subsequent mailing of enclosures for the Complaint was sent on June 23, 2005 and received by Respondent based on a July 7, 2005 phone conversation. The initial mailing was never picked up by Respondent from the Post Office. The June 21, 2005 certified letter and Complaint were returned to

a pollutant to waters of the United States without a permit in violation of sections 301 and 402 of the Act, CWA, 33 U.S.C. §§ 1311, 1342. Due to the delay in service of the Complaint on Respondent, the deadline for filing an answer to the Complaint, pursuant to section 22.15(a) of CROP, was September 15, 2005, 30 days after service of the Complaint. *See*, 40 C.F.R. § 22.15(a). The Respondent did not file an answer by September 15, 2005. A review of the record indicates that an answer has not been filed with the Regional Hearing Clerk to date.

On February 17, 2006, Complainant filed a motion pursuant to section 22.17(b) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(b), to find Respondent in default for failing to file a timely answer to the Complaint issued pursuant to section 309(g) of the Act, for violation of section 301 of the Act , 33 U.S. C. § 1311. Specifically, Complainant alleged a discharge of a pollutant from a point source into waters of the United States without a section 402 permit. For the alleged violations, the Complainant is requesting the assessment of an administrative penalty, in the amount of **Five Thousand Dollars ($5,000.00).**

This proceeding is governed by EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules" or "CROP"). Section 22.17(a) of the Consolidated Rules authorizes a finding of default upon failure of the Respondent to timely answer the Complaint. Section 22.15(a) of the Consolidated Rules requires that an Answer to the Complaint be filed with the Regional Hearing Clerk within thirty (30) days after service.

II. DETERMINATION OF LIABILITY

The Consolidated Rules provide that:

> A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint….or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.*** When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision…The relief proposed in the complaint …shall be ordered unless the requested relief is clearly inconsistent with the Act.

40 C.F.R. § 22.17.

Complainant on August 8, 2005. Complainant states that on August 12, 2005, Complainant resent the returned package via Federal Express to Respondent's office. On August 16, 2005, Complainant received confirmation of service of the Complaint on Respondent.

Respondent was served a copy of the Rules of Practice along with service of the Complaint on August 16, 2006. Respondent was also warned of the consequences of failure to file an answer to the Complaint. The Complaint states as follows:

> To assert its right to a hearing, the Respondent must file a written answer (and one copy) with the Regional Hearing Clerk of EPA Region 8 (999 18th Street, Suite 300, Mail Code 8RC, Denver, Colorado 80202) within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts the Respondent disputes, and its request for a public hearing. Please see section 22.15 of the Rules of Practice for more information on what must be in the answer. **FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE THE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS AND/OR PROPOSED PENALTY. IT MAY ALSO RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE FULL PENALTY PROPOSED IN THE COMPLAINT OR THE MAXIMUM PENALTY AUTHORIZED BY THE ACT.**

Complaint, p. 1 of 6.

Despite several attempts by Complainant to ensure that the Complaint was held at the post office for Respondent to pick up, as well as Complainant's October 5, 2005 reminder to file an answer and warning that it would file a Motion for Default if Respondent's answer was not filed within two weeks, Respondent has failed to comply with the requirements set forth in the Rules of Practice, 40 C.F.R. § 22.15. Such failure to respond provides a basis for finding Respondent in default. However, the decision to find a party in default remains a matter within the Presiding Officer's discretion.

It is noted that default orders are not favored by the law and as a general rule cases should be decided on their merits whenever possible. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Default judgments are an extreme sanction which should only be imposed "upon a serious showing of willful default." *Davis v. Musler*, 713 F.2d 907, 916 (2nd Cir. 1983). Complainant moved for a default after several attempts to assist the Respondent in avoiding this sanction.

In the case at hand, there is enough support in the case file for a finding that Respondent's default is willful. Respondent has been on notice for at least 10 months, if not longer, of its obligation to file an answer. After Complainant made the necessary attempts to ensure Respondent received the Complaint and provided reminders to file an answer, Respondent has continued to disregard the allegations set before it. Since Respondent did not file an answer to the Complaint, it has presented no evidence to contravene the facts alleged in the Complaint. There have been no requests for extension of time, nor any showing of cause as to Respondent's inability to file an answer. For failure to comply with the Consolidated Rules, the Respondent is hereby found to be in default. In addition, a finding of default constitutes an admission of the facts alleged in the Complaint. See, 40 C.F.R. § 22.17(a).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following Findings of Fact and Conclusions of Law are based upon the Complaint.

1. Respondent, Melotz Trucking, Inc., is a corporation, in good standing, doing business in the State of Montana.

2. Respondent is a "person" as defined in Section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.

3. Respondent owns and operates a trucking company that provides de-icing and dust abatement products and services, which is located at 9780 Summit Dr., Missoula, Montana, 59808.

4. An August 3, 2004 crash investigation report, accident number 04-000-1211-08-01, and a November 11, 2004 report submitted by Atlatl, Inc. state that a semi-truck pulling a double tanker trailer owned by Respondent was traveling westbound on interstate 90 near MP 175.5, Garrison, Montana, when a nut on the hitch pin of the second tanker trailer came off and subsequently caused the second trailer to disengage from the unit and roll onto its top in the passing lane of the west bound lanes.

5. The tanker trailer leaked its contents, Magnesium Chloride, into the median which drained into the Little Blackfoot River.

6. In a January 13, 2005 response to an EPA information request, Respondent stated the second tanker, noted in paragraph 4 above, contained approximately 2000 gallons of Magnesium Chloride, 26 to 35 percent solution, which is and was at all relevant times a "point source" as defined in section 502(14) of the Act, 33 U.S.C. § 1362(14).

7. Magnesium Chloride is a "pollutant" as defined by section 502(6) of the Act, 33 U.S.C. § 1362(6).

8. The runoff due to the spill from the Respondent's tanker truck is a "discharge of a pollutant" as defined by section 502(12) of the Act, 33 U.S.C. §1362(12) and 40 C.F.R. § 122.2.

9. The Little Blackfoot River is a "navigable water" and "waters of the United States" as defined by Section 502(7) of the Act, 33 U.S.C. §1362(7) and 40 C.F.R. § 122.2, respectively.

10. Section 301(a) of the Act, 33 U.S.C. §1311(a) prohibits the discharge of pollutants into navigable waters of the United States, except in compliance with certain sections of the Act.

11. Section 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. §1319(g)(2)(A), provides that any person who violates Section 301(a) of the Act, 33 U.S.C. §1311(a), shall be subject to a civil penalty.

COUNT 1

12. The discharge described in paragraph 4 was not permitted under section 402 of the Act, 33 U.S.C. §1342. No permit authorizing the Respondent's discharge of a pollutant to the Little Blackfoot River has been issued pursuant to 33 U.S.C. §1342. Accordingly, each day of discharge is a separate violation of section 301 of the Act. 33 U.S.C. §1311(a).

13. The Respondent's discharge as described above violated section 301(a) of the Act, 33 U.S.C. §1311(a).

Based on the facts set forth above, and the allegations set forth in the Complaint, which are herein admitted, I find that the Complainant has established a prima facie case against the Respondent for violating the CWA for discharging without a permit in violation of sections 301 and 402 of the Act. 33 U.S.C. §§1311, 1342. Pursuant to section 22.17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a), and based on the entire record of these proceedings, I also find the Respondent**,** Melotz Trucking, Inc., in default for failing to file a timely answer to the Complaint.

IV. ASSESSMENT OF ADMINISTRATIVE PENALTY

Under section 22.27(b) of the Consolidated Rules of Practice, " . . . the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. If the Respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by Complainant in the Complaint . . . , or motion for default, whichever is less."

The courts have made it clear that, notwithstanding a Respondent's default, the Presiding Officer must consider the statutory criteria and other factors in determining an appropriate penalty. Katson Brothers Inc., v. U.S. EPA, 839F.2d 1396 (10th Cir. 1988). Moreover, the Environmental Appeals Board has held that the Board is under no obligation to blindly assess the penalty proposed in the Complaint. Rybond, Inc., RCRA (3008) Appeal No 95-3, 6 E.A.D. 614 (EAB, November 8, 1996).

Section 309(a) of the Act, 33 U.S.C. § 1319(a), provides that in any case in which any person who violates any requirement of the Act, the Administrator is authorized to bring a civil action. The Administrator may assess a Class I civil penalty of not more than $11,000 per violation with a maximum for all violations of $32,500 occurring after March 15, 2004. *See*, 40 C.F.R. Part 19.

Section 309(g) of the Act, 33 U.S.C. § 1319(g), requires EPA to take into account the following factors in assessing a civil penalty: the nature, circumstances, extent and gravity of the violations(s) and, with respect to the violator, ability to pay, any prior history of such violations, degree of culpability, any economic benefit or savings gained from the violation, and such other matters as justice may require. 33 U.S.C. § 1319(g)(3).

The Complainant proposes assessing a penalty of $5,000.00 for the violations alleged in the Complaint. The basis for this penalty amount, taking into consideration the statutory factors of section 309(g)(3) of the Act are as follows:

Seriousness of the Violation: The August 3, 2004 truck roll over accident caused approximately 2000 gallons of Magnesium Chloride to be discharged into the Little Blackfoot River. Vegetation in and adjacent to the Little Blackfoot River was impacted by the spill. Conductivity tests done on soil samples taken from the impacted site show highly elevated conductivity levels, especially near/on the stream bank. Magnesium Chloride is harmful to freshwater aquatic species and to plants that are not saline tolerant. While the site was remediated by the Respondent, an unknown quantity of the pollutant discharged into the Little Blackfoot River.

Culpability: This component considers the information, sophistication and resources available to the Respondent and the degree to which they should have been able to prevent the violations. Complainant states that Respondent could have prevented the discharge had the tanker trailer been properly assembled and/or maintained. Complainant also states that had Respondent notified the National Response Center regarding the spill at the time of the accident, a site assessment as well as a quicker clean up could have occurred. A trucking company, in the business of transporting chemicals, should ensure that its trucks are property assembled and maintained as well as be aware of reporting procedures regarding spills. Based on this information, the Respondent is culpable.

Economic Benefit: The Complainant made no economic benefit calculation. Therefore, economic benefit may have been realized by Respondent however a specific monetary amount was not disclosed. If there was economic benefit in this matter, it was negligible.

Prior Compliance History: This is the first enforcement action against Respondent under the CWA.

Ability to Pay: The proposed penalty was not reduced based on ability to pay. By failing to answer the Complaint, Respondent failed to present any information as to any mitigating circumstances.

Other Matters That Justice May Require: Since the Respondent did not file an answer to the Complaint, it has presented no evidence to contravene the facts alleged in the Complaint. Therefore no adjustments to the penalty were made.

Under section 22.17(c) of the Consolidated Rules, ". . . [the] relief proposed in the Complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." In its motion for default, the Complainant requested the assessment of a civil penalty, in the amount of **$5,000.00,** against the Respondent for its violations. Therefore, based on the statute, regulations and the administrative record, I assess the Respondent a civil penalty in the amount of **$5,000.00**, for its violations of the CWA.

DEFAULT ORDER[2]

In accordance with section 22.17 of the Consolidated Rules, 40 C.F.R. § 22.17, and based on the record and the Findings of Fact set forth above, I hereby find that Respondent is in default and liable for a total penalty of **$5,000.00.**

IT IS THEREFORE ORDERED that Respondent, Melotz Trucking, Inc. shall, within thirty (30) days after this order becomes final under 40 C.F.R. § 22.27(c), submit by cashier's or certified check, payable to the United States Treasurer, payment in the amount of **$5,000.00** to the following address:

Mellon Bank
EPA Region 8
Lock Box, 360859
Pittsburgh, Pennsylvania 15251-6859

Respondent shall note on the check the title and docket number of this Administrative action.

Respondent shall serve a photocopy of the check on the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
EPA Region 8
999 18th Street, Suite 300
Denver, Colorado 80202

Each party shall bear its own costs in bringing or defending this action.

Should Melotz Trucking, Inc. fail to pay the penalty specified above in full by its due date, the entire unpaid balance of the penalty and accrued interest shall become immediately due and owing. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty, if it is not paid as directed. Interest will be

[2] **Pursuant to 40 C.F.R. § 22.17(c), Respondent may file a Motion to set aside the default order for good cause**.

assessed at the rate of the United States Treasury tax and loan rate, in accordance with 40 C.F.R. § 102.13(e).

This Default Order constitutes an Initial Decision, in accordance with 40 C.F.R. § 22.27(a) of the Consolidated Rules. This Initial Decision shall become a Final Order forty five (45) days after its service upon a Party, and without further proceedings unless: (1) a party moves to reopen the hearing; (2) a party appeals the Initial Decision to the Environmental Appeals Board; (3) a party moves to set aside a default order that constitutes an initial decision; or (4) the Environmental Appeals Board elects to review the Initial Decision on its on initiative.

Within thirty (30) days after the Initial Decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. 40 C.F.R. § 22.27(a). If a party intends to file a notice of appeal to the Environmental Appeals Board it should be sent to the following address:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Where a Respondent fails to appeal an Initial Decision to the Environmental Appeals Board pursuant to § 22.30 of the Consolidated Rules, and that Initial Decision becomes a Final Order pursuant to § 22.27(c) of the Consolidated Rules, **RESPONDENT WAIVES ITS RIGHT TO JUDICIAL REVIEW.**

SO ORDERED This 9th Day of June, 2006.

SIGNED
Elyana R. Sutin
Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **DEFAULT INITIAL DECISION AND ORDER** in the matter of **MELOTZ TRUCKING, INC. a MONTANA CORPORTION, DOCKET NO.: CWA-08-2005-0033** was filed with the Regional Hearing Clerk on June 9, 2006.

Further, the undersigned certifies that a true and correct copy of the document was delivered to Marc Weiner, Enforcement Attorney, U. S. EPA – Region 8, 999 18th Street, Suite 300, Denver, CO 80202-2466. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt requested on June 9, 2006, to:

Mark Melotz
Melotz Trucking, Inc.
P. O. Box 17012
Missoula, MT 59808

Mark Melotz
Melotz Trucking, Inc.
9780 Summit Drive
Missoula, MT 59808

June 9, 2006

SIGNED
Tina Artemis
Regional Hearing Clerk